

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

HARBOR POINTE ENTERTAINMENT LLC,  
ANTHONY BRANDEL, and A & E  
INVESTMENTS LLC,

UNPUBLISHED  
May 20, 2003

Plaintiffs-Appellants/Counter-  
Defendants/Cross-Appellees,

v

No. 234658  
Muskegon Circuit Court  
LC No. 99-039555-CK

WATERS BROADCASTING CORP, NANCY  
WATERS, and JAMES WATERS,

Defendants-Appellees/Counter-  
Plaintiffs/Cross-Appellants,

and

VERNON KORTERING,

Garnishee-Defendant/Cross-  
Appellant,

and

MERRILL LYNCH PIERCE FENNER & SMITH  
INC,

Garnishee-Plaintiff/Intervenor/  
Appellee.

---

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition to defendants on plaintiffs' complaint for breach of contract and anticipatory breach of contract, and denying plaintiffs' claim to setoffs. Plaintiffs also appeal the trial court's order denying release of a disputed fund of \$100,000 held by attorney Vernon Kortering, and awarding attorney fees to defendants. Defendants cross-appeal from those parts of the trial court's orders that recognized

the priority claim of Merrill Lynch, as intervening judgment creditor, to the disputed \$100,000 held by Korterling, and also appeal the trial court's decision not to impose sanctions on plaintiffs' counsel for filing a frivolous complaint. We affirm.

A trial court's grant or denial of summary disposition is reviewed de novo on appeal, *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002), as is the interpretation of contracts, *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). Similarly, equitable actions, including actions to rescind a contract, are reviewed de novo. The factual findings of the trial court, however, are reviewed for clear error. MCR 2.613(C); *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982).

A party's claim to summary disposition based on MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b). The moving party must specifically identify the undisputed factual issues, MCR 2.116(G)(4), and has the initial burden of supporting its position with evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The trial court must consider the submitted evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with evidentiary materials that a genuine material issue of disputed fact exists and, upon failure to do so, summary disposition is properly granted. MCR 2.116(G)(4); *Smith, supra* at 455 n 2.

The trial court correctly granted defendants summary disposition on plaintiffs' complaint because the pleadings, depositions, admissions, and documentary evidence submitted to the trial court, viewed in the light most favorable to plaintiffs, established that plaintiffs failed to fulfill a material condition to the parties' agreement, entitling defendants to rescission. See *Cramer v Metropolitan Savings & Loan Ass'n*, 401 Mich 252, 261-262; 258 NW2d 20 (1977). We find that plaintiffs' arguments to the contrary are without merit.

On July 1, 1999, the parties entered into three agreements that plainly required plaintiffs to establish, either on that day or by the end of the day on July 2, 1999, a \$100,000 escrow account, with Merrill Lynch acting as the escrow agent.

A local marketing agreement (LMA) signed by the parties on July 1, 1999, provided:

As good faith Harbor Pointe Entertainment L.L.C. shall place into an interest bearing escrow account the sum of \$100,000 to cover any fines and/or as a penalty payment to Nancy A. Waters (WBC) in the event of default in failure to purchase or default in payments pursuant to the LMA.

The parties also signed a letter of intent (LOI) on July 1, 1999, which provided in part:

On July 1, 1999, Buyer agrees to deposit the sum of \$100,000.00 in an escrow account with Merrill Lynch, the proceeds of which are to be applied against any FCC violations, fines, or other damages incurred by Waters Broadcasting Corporation, pursuant to the attached LMA. The balance of the escrow funds shall be payable to Seller in the event Buyer does not exercise its option to

purchase or becomes in default, otherwise they shall be applied against the purchase price at closing.

\* \* \*

These proposal(s) will expire at 5:00 p.m. on July 2, 1999 unless earlier accepted by Seller's execution of this letter and Seller's delivery thereof to Buyer.

Further, the parties signed on July 1, 1999, an escrow agreement appointing Merrill Lynch as escrow agent, which also states: "Buyer agrees to deposit the sum of One Hundred Thousand dollars (\$100,000) with Escrow Agent."

The breach or default by a party of a material condition essential to a contract entitles the aggrieved party to rescind or terminate the contract. *Cramer, supra* at 261; *Omnicom of Michigan v Gianetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997). Here, the materiality of the escrow condition is evident from the plain language of the parties' agreements. See, e.g., *Meagher v Wayne State University*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (when contractual language is clear its construction is a question of law for the court), and *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999) (unambiguous contracts are enforced as written). In addition to the plain language of the agreements, there simply is no dispute in this case that the \$100,000 escrow provision was a material condition to the parties' agreements. Plaintiffs' counsel testified at defendants' motion for sanctions as follows:

Q. Do you feel that the hundred thousand dollar deposit in escrow would have been a material condition to these agreements?

A. Yes, which is why we wanted to have the funds deposited with an escrow agent.

It is further undisputed that plaintiffs did not establish a segregated \$100,000 escrow account with Merrill Lynch as escrow agent by July 2, 1999. Moreover, it is undisputed that plaintiffs did not establish such an account with attorney Vernon Kortering as escrow agent by an extended deadline of August 31, 1999, as agreed to by defendants. Thus, defendants were entitled to exercise the remedy of rescission. *Cramer, supra*. Because defendants properly rescinded the agreement, they were no longer bound by its terms. *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995) (rescission abrogates a contract as if it had never been made). "[I]f a condition [of a contract] is breached or does not occur, the promisee acquires no right to enforce the promise." 17A CJS, Contracts, § 355. In sum, defendants were entitled to judgment as a matter of law on plaintiffs' complaint for breach of contract or anticipatory breach of contract. MCR 2.116(C)(10).

Plaintiffs' arguments to the contrary lack merit. First, the solvency of plaintiffs at the time the agreements were entered was immaterial to the trial court's decision to grant summary disposition to defendants on plaintiffs' complaint. The trial court explicitly ruled that the sole basis for granting summary disposition was plaintiffs' failure to timely establish the required escrow account. Thus, whether plaintiffs were insolvent was simply not a material fact at issue.

regarding the dispositive claim that plaintiffs failed to establish the required escrow account. MCR 2.116(G)(4).

Next, plaintiffs argue that defendants were aware of problems establishing an escrow account with Merrill Lynch and that, whether defendants waived strict compliance by continuing to accept payments under the LMA was a question of fact to be resolved at trial. The trial court rejected this argument, finding that the undisputed facts showed that plaintiffs made “continuous inaccurate representations to defendants that the escrow account of \$100,000 had been properly established” when it had not been. Further, the trial court reasoned that waiver of default is predicated on certain knowledge that a default has in fact occurred, and that once defendants were certain of plaintiffs’ breach they elected to rescind the contract. While the trial court may have erred by deciding disputed issues of fact, *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993), it nonetheless reached the right result, *Hall v McRea Corp*, 238 Mich App 361, 369; 605 NW2d 354 (1999).

It is undisputed that defendants learned that no escrow account existed at Merrill Lynch by August 13, 1999, and that thereafter defendants asserted in several letters that plaintiffs were in default for, among other reasons, plaintiffs’ failure to establish the escrow account. Further, it is undisputed that from August 13 through August 25, 1999, the parties continued to discuss plaintiffs’ compliance with the contract, including establishing an escrow account. Defendant James Waters wrote in a letter dated August 18, 1999, that defendants would accept attorney Vernon Kortering as escrow agent. It is also undisputed that during a meeting of the parties on August 25, 1999, defendants offered to accept Kortering as escrow agent provided that the \$100,000 was deposited by August 31, 1999. Furthermore, it is undisputed that \$100,000 was not deposited with Kortering until September 2, 1999. Thus, the record, viewed in the light most favorable to plaintiffs, only establishes a waiver by defendants of strict compliance with the July 1 or 2, 1999 time requirement for establishing the escrow account. The undisputed facts established that plaintiffs failed to deposit \$100,000 with Kortering within the extended deadline.

Next, plaintiffs argue that defendants waived the escrow condition by accepting payments under the LMA. We find this argument also to be without merit. The payments made by plaintiffs were for broadcast airtime and to employ defendants’ station manager to ensure compliance with FCC rules and regulations, benefits which they received. Further, the LMA contained a clause specifically disclaiming waiver by failing to act or by delay. Although it may be possible in some circumstances for a waiver to occur even in the face of a “no-waiver” clause, the facts and circumstances indicating waiver must be compelling. *Formall, Inc v Community Nat’l Bank of Pontiac*, 138 Mich App 588, 601; 360 NW2d 902 (1984). Generally, to find an implied waiver, the conduct of the party against whom waiver is asserted must be inconsistent with strict compliance with the terms of the contract. *H J Tucker & Associates, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 564-565; 595 NW2d 176 (1999). Here, although it was disputed whether defendants’ conduct caused some delay in selecting an escrow agent to replace Merrill Lynch, there is no evidence of an intention by defendants to waive the escrow condition. Defendants’ acceptance of payments for radio airtime, and acceptance of payments for the services of their radio station manager, are not inconsistent with defendants’ expressed intent to require compliance with the escrow condition. Rather, defendants’ conduct was consistent with insisting on compliance with the entire agreement. In short, defendants’

acceptance of payments under other parts of the contract is simply an insufficient basis for reasonable minds to infer that defendants intended to waive compliance with the escrow condition. In light of the “no waiver” clause, and the expressed intent of defendants, plaintiffs failed to meet their burden of demonstrating that a genuine material issue of disputed fact existed. MCR 2.116(G)(4).

Next, we find plaintiffs’ circular, semantic argument based on defendants James Waters and Nancy Waters’ opinion that a valid escrow agreement never existed because one was never funded, to be specious. The agreement of the parties clearly contemplated a fully funded escrow account controlled by an independent escrow agent, first Merrill Lynch, and later Vern Kortering. It is undisputed that such an escrow account was never established within the time limit originally provided for by the agreement or as later extended. As discussed above, plaintiffs’ material breach of the escrow condition justified defendants’ rescission of the contract.

Next, plaintiffs contend that defendants prevented them from complying with the contract. See *Kiff Contractors, Inc v Beeman*, 10 Mich App 207, 210; 159 NW2d 144 (1968) (a party to a contract cannot prevent performance by the other party and still recover damages for nonperformance). Again, we find plaintiffs’ argument to be without merit. Even accepting plaintiffs’ contention that defendants were aware that Merrill Lynch would not act as escrow agent, and that defendants delayed selecting an alternate escrow agent, plaintiffs cite nothing done by defendants to prevent timely funding of an escrow account after the parties agreed that Kortering act as escrow agent. Thus, the cited general rule has no application to the instant case.

Next, plaintiffs argue that the trial court erred by denying them the right to offset payments made to defendants under the contract after the trial court found that defendants were entitled to \$100,000 in liquidated damages, as well as indemnification for attorney fees. We disagree. Plaintiffs waived their claim to setoff by failing to raise that claim in either their first responsive pleading to defendants’ amended counterclaim, MCR 2.111(F)(2), or in an amended pleading, MCR 2.111(F)(3). Moreover, the trial court did not abuse its discretion by refusing to consider legal arguments raised for the first time at a motion for reconsideration. MCR 2.119(F)(3); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); *Charbeneau v Wayne Co Gen Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Here, a counterclaim was filed against plaintiffs who never included in their responsive pleadings, motions or amended pleadings, a claim for setoff. Moreover, limiting discovery, as plaintiffs claim the trial court did, would not have precluded plaintiffs from asserting a claim to setoff. Although not specifically listed as an affirmative defense in the court rules, a claim to setoff would be comparable to the affirmative defense of payment or satisfaction. See, e.g., *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9; 614 NW2d 169 (2000), quoting *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993) (“An affirmative defense is a defense that does not controvert the plaintiff’s establishing a prima facie case, but that otherwise denies relief to the plaintiff”). Indeed, plaintiffs never asserted an affirmative claim to setoff, or sought to amend their pleadings, but only claimed setoff in a responsive pleading to a motion for reconsideration filed by defendants. Under these circumstances, plaintiffs waived their claim. “It is well-settled that defenses that go beyond

rebutting a plaintiff's prima facie case must be pleaded, or they are waived." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 90; 535 NW2d 529 (1995).

Moreover, defendants' motion, and plaintiffs' response thereto, were heard under MCR 2.119(F)(3), which requires that "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." The court rule does not restrict the trial court's discretion to give a moving party a "second chance," *Sutton v Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002); *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000). However, this Court has consistently held that a trial court does not abuse its discretion if it refuses to entertain facts or legal arguments previously raised or that could have been previously raised, *Churchman, supra*; *Charbeneau, supra*.

In addition to procedural default, the merits of plaintiffs' argument are unconvincing. Plaintiffs are correct to point out that rescission abrogates a contract from the beginning and requires restoring the parties to the status quo. *Lash, supra*. Indeed, rescission is an equitable remedy entrusted to the sound discretion of the trial court, *Lenawee Co Bd of Health, supra*, and the inability of the party seeking rescission to restore the status quo may be grounds to deny rescission, *McMullen v Joldersma*, 174 Mich App 207, 218-219; 435 NW2d 428 (1988). However, because rescission is an equitable remedy, it may be granted although the status quo cannot be restored where the equities between the parties can be balanced. 17B CJS, Contracts, § 488. Here, defendants experienced costs – three months of lost radio programming and the services of the manager – which could not be restored to them. Because the payments made by plaintiffs were roughly equivalent to the lost costs, the equities here were fairly balanced without total restoration of the status quo.

In sum, plaintiffs waived any claim to setoff, the trial court did not abuse its discretion in denying reconsideration, and the equities between the parties were fairly balanced without restoring to plaintiffs the payments made under the contract.

Plaintiffs also argue that the trial court erred by relying on MCR 2.614(A)(1) to order Kortering to retain the balance of the \$100,000 deposited with him by A & E Investments after satisfying a garnishment writ by Merrill Lynch in the amount of \$85,934.83. We disagree. Interpretation and application of the court rules is a question of law subject to de novo review. *In re Gosnell*, 234 Mich App 326, 333; 594 NW2d 90 (1999). When action under a court rule is discretionary its exercise is reviewed for an abuse. See, e.g., *Blue Cross and Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 314; 561 NW2d 488 (1997).

The disputed \$100,000 account was under the control of Kortering, who believed that he was acting as escrow agent for the parties in the instant litigation. Kortering explicitly informed all interested parties that the funds he controlled would not be released without an order of the trial court presiding over this litigation. At the same hearing at which plaintiffs argued for the release of the funds, the trial court heard, and ultimately granted judgment to defendants for \$100,000 in liquidated damages, and at that point, undetermined attorney fees. The trial court permitted satisfaction of judgment creditor Merrill Lynch, which plaintiffs recognized, and ordered that Kortering retain the remainder, citing MCR 2.614(A)(1).

General principles of statutory construction apply to interpret the meaning of a court rule. *Meece v Meece*, 223 Mich App 344, 346; 566 NW2d 310 (1997). The first rule of construction is to apply the clear language of the rule, giving effect to the ordinary meaning of the words used in light of the purpose to be accomplished. *Id.* at 346-347. “Court rules are construed in the same manner as statutes. If the language of the court rule is clear, this Court should apply it as written.” *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 397; 554 NW2d 345 (1996). Here, the plain language of the court rule prohibits, in general, execution on a judgment before expiration of twenty-one days. However, the rule also provides: “Nothing in this rule prohibits the court from enjoining the transfer or disposition of property during the 21-day period.” MCR 2.614(A)(1). Thus, although the plain language does not contain a positive grant of authority, it also plainly provides that the “automatic stay” does not prohibit the court from exercising its equitable authority and “enjoining the transfer or disposition of property.”

Under Const 1963, art 6, § 13, circuit courts “have original jurisdiction in all matters not prohibited by law . . . .” Further, MCL 600.601 provides, in part:

(1) The circuit court has the power and jurisdiction:

(A) possessed by courts of record at the common law, as altered by the state constitution of 1963, and laws of this state, and the rules of the supreme court.

(B) Possessed by courts and judges in chancery in England on March 1, 1847, as altered the state constitution of 1963, the laws of this state, and the rules of the supreme court.

(C) Prescribed by the rules of the supreme court.

In addition, circuit courts “have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.” MCL 600.605. As noted above, MCR 2.614(A)(1) does not limit the circuit courts’ equitable powers, and plaintiffs cite no other limiting authority. Rather, circuit courts “have jurisdiction and power to make any order proper to fully effectuate the circuit courts’ jurisdiction and judgments,” MCL 600.611, and both our Supreme Court and this Court have recognized that a circuit court possesses inherent authority to enforce its own directives. See *Walworth v Wimmer*, 200 Mich App 562, 564; 504 NW2d 708 (1993). Thus, the trial court did not err in ordering Kortering to retain the balance of the escrow account pursuant to MCR 2.614(A)(1).

Finally, plaintiffs argue that the trial court erred by awarding defendants attorney fees and costs. However, plaintiffs premise their argument on their claim that the trial court erred by granting summary disposition to defendants on plaintiffs’ complaint. As discussed above, this claim fails. Also, because plaintiffs do not contest the trial court’s findings that the parties’ agreement provided for liquidated damages, which together with the indemnification clause survived rescission of the contract, we do not address the issue. See, e.g., *Samuel D Begola*

*Services, Inc v Wild Brothers*, 210 Mich App 636, 641; 534 NW2d 217 (1995) (holding that an indemnification clause may survive rescission where intended by the parties).

Defendants cross-appeal, raising several issues that were first raised below on motion for reconsideration. The trial court's decision on a motion for reconsideration is reviewed for an abuse of discretion. *Churchman, supra*; *Charbeneau, supra*.

Defendants first argue that they had an equitable lien in the disputed \$100,000 held by Kortering that had priority over Merrill Lynch's garnishment lien. We disagree.

In the light most favorable to defendants, the latest date by which plaintiffs could establish the \$100,000 escrow account and still satisfy the parties' agreement was August 31, 1999. It was undisputed that the \$100,000 was not deposited with Kortering until September 2, 1999. The trial court reasoned that it could hardly find that the escrow account survived rescission of the parties' contract when the failure to establish such an account was the basis for rescission relied upon by the trial court to grant summary disposition to defendants on plaintiffs' complaint. The trial court did not err by finding that it would be inequitable to both rescind the parties' contract and award defendants an equitable lien to the specific funds held by Kortering with priority over the garnishment lien of Merrill Lynch.

Moreover, the doctrine of judicial estoppel precludes a party from asserting a position inconsistent from one successfully and unequivocally asserted in a prior proceeding. *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994); *Hall, supra* at 366. Here, in response to plaintiffs' complaint, defendants successfully and unequivocally asserted that plaintiffs had never established an escrow account as required by the parties' agreement. The trial court specifically found that plaintiffs have "always argued strongly and unequivocally that no escrow account had ever been established by plaintiffs during the time period required." Further, the trial court granted defendants summary disposition on plaintiffs' complaint and found that "[p]laintiffs never have to this date placed \$100,000 in an escrow account at Merrill Lynch, even though for several weeks plaintiffs inaccurately represented to defendants that the escrow account had been established." Judicial estoppel precludes defendants from asserting an equitable claim to a fund that they successfully and unequivocally asserted did not exist.

Next, defendants raise several arguments under statutes and court rules governing garnishment. Again, defendants' arguments were first raised on motion for reconsideration below. Defendants failed to establish that the trial court committed palpable error, MCR 2.119(F)(3), and we find that the trial court did not abuse its discretion by refusing to consider legal arguments raised for the first time at a motion for reconsideration, *Churchman, supra*; *Charbeneau, supra*.

Garnishee-defendant Kortering, after being served with the writ of garnishment by Merrill Lynch, advised all interested parties that without an order by the trial court, he would not release money in the account he controlled. The trial court permitted Merrill Lynch to intervene in the instant litigation, and all interested parties either had notice of, or appeared and presented argument to the trial court concerning disposition of the account controlled by Kortering. Kortering asserted that he was neutral and only wanted direction from the trial court concerning disposition of the funds he held. Thus, Kortering voluntarily submitted to the jurisdiction of the

trial court and never raised any objection to the garnishment proceedings. If there was any defect in the garnishment proceedings, Kortering waived them. Thus, defendants' argument that the garnishment proceedings were defective fails.

Defendants' constitutional due process claim is also meritless. *Charbeneau, supra*. Defendants had ample opportunity to be heard, presented voluminous pleadings in the trial court and ultimately were successful on the majority of their claims presented below.

Finally, defendants claim that the trial court erred by denying their motion for sanctions alleging plaintiffs and their counsel filed a frivolous complaint. We disagree. A trial court's finding whether a claim or defense was frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). The trial court commits clear error when, although there is evidence to support its finding, the reviewing court is left with a definite and firm conviction that a mistake was made. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999).

The signature of an attorney on a pleading or other document required by MCR 2.114(C) constitutes a certification that: (1) the signor has read the pleading; (2) to the best of the signor's knowledge, information and belief after reasonable inquiry, the pleading is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and (3) the pleading is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. MCR 2.114(D); *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 720; 591 NW2d 676 (1998). If a pleading is signed in violation of MCR 2.114, the party or attorney or both must be assessed an appropriate sanction, which may include reasonable attorney fees. MCR 2.114(E). Also, pursuant to MCR 2.114(F), a party that files a frivolous claim or defense is subject to assessment of costs under MCR 2.625(A)(2), which incorporates MCL 600.2591. *In re Costs & Attorney Fees*, 250 Mich App 89, 101; 645 NW2d 697 (2002).

Under MCL 600.2591(1) and (2), the prevailing party shall, upon motion and a finding that a claim or defense was frivolous, be awarded as against the nonprevailing party and their attorney reasonable costs actually incurred and reasonable attorney fees. A claim or defense is frivolous when: (1) the party's primary purpose was to harass, embarrass or injure the prevailing party; (2) the party had no reasonable basis to believe that the underlying facts were true; or (3) the party's position was devoid of arguable legal merit. MCL 600.2591(3)(a), *Kitchen, supra* at 662. The claim or defense must be evaluated as of the time it was asserted. *In re Attorney Fees & Costs, supra* at 701-702.

Here, the basis for defendants' claim for sanctions was that counsel knew that an escrow account had not been established, and that plaintiffs had not prepared an FCC application, and therefore, counsel knew that plaintiffs were in default on the contract. Counsel argued that from plaintiffs' perspective there had been a breach of contract when defendants "pulled the plug" on plaintiffs' radio broadcasts for about two minutes, and also that plaintiffs' complaint alleging anticipatory breach of contract was supported by letters written by defendants James and Nancy Waters in mid-August that clearly indicated an intent on defendants' part to terminate the contract.

Plaintiffs' counsel, Charles Luyendyk, testified that his client informed him that defendants had turned the station off as a punishment, which he considered a breach of contract, and that he had several conversations with James and Nancy Waters in which they claimed plaintiffs were in default and defendants intended to repossess the radio station. Luyendyk also claimed that defendants created an impossible condition to meet when, after learning that Merrill Lynch could not serve as an escrow agent, they refused to name a replacement escrow agent. The testimony revealed a clear difference of legal opinion between Luyendyk and James and Nancy Waters as to the requisite FCC forms and contract documents needed to transfer defendants' FCC license.

The trial court denied defendants' motion for sanctions by concluding that plaintiffs' complaint was not "frivolous" within the meaning of MCL 600.2591(3)(a) and MCR 2.114(D), (E), and (F):

The Court finds from the record that the disputed facts in this case are subject to widely varying range of interpretations, and merely because one party's interpretation ultimately prevailed does not make the other party's interpretation "frivolous." There were legitimate varying interpretations by the parties in light of the various extensions of time granted to perform under the contracts as to the nature of the \$100,000 deposit; the availability of funding sources; and the adequacy of the FCC documents, etc.

The trial court did not clearly err. There was no evidence that plaintiffs sought to "harass, embarrass, or injure the prevailing party." MCL 600.2591(3)(a)(i). From plaintiffs' perspective, at the time they filed their complaint on August 25, 1999, defendants had breached the LMA by "pulling the plug" on plaintiffs' radio programming, albeit for only a couple of minutes. In addition, the several letters delivered to plaintiffs by defendants in mid-August 1999 provided a factual basis for plaintiffs to anticipate a breach of contract by defendants. Thus, it cannot be said of plaintiffs' complaint that there was "no reasonable basis to believe that the facts underlying that party's legal position were in fact true," MCL 600.2591(3)(a)(ii), or that plaintiffs' "legal position was devoid of arguable legal merit," MCL 600.2591(3)(a)(iii). Moreover, that plaintiffs after filing their complaint failed to cure their default within an extension of time for compliance, and therefore defendants ultimately prevailed, did not make their complaint "frivolous" when filed. *In re Attorney Fees & Costs, supra* at 702; *Meagher, supra* at 727. Thus, the trial court's finding that plaintiffs' complaint was not "frivolous" within the meaning of MCL 600.2591(3)(a) and MCR 2.114(D), (E), and (F) was not clearly erroneous.

We affirm.

/s/ William C. Whitbeck  
/s/ Mark J. Cavanagh  
/s/ Richard A. Bandstra